UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	***)***	
	)	
v.	***)***	
	)	***Docket No. CR-92-19-P-H***
DONALD R. LOTHROP,	***)***	***(Civil No. 97-127-P-H)***
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255

Donald R. Lothrop moves this court to vacate, set aside or correct the sentence imposed by this court following his guilty plea to a charge of possession of a firearm by a felon, a violation of 18 U.S.C. § 922(g)(1). He was sentenced to a term of 188 months imprisonment. He contends (1) that he received ineffective assistance of counsel because his lawyer did not pursue an appeal after Lothrop told him that he "might appeal," was unaware of case law concerning the alleged fact that the firearm in question was present in an apartment jointly occupied by Lothrop and his girlfriend, and did not know about "the restoration of civil rights by the State of Maine as pertains to felons," Motion Under 28 U.S.C. § 2255 (Docket No. 41) at 5, and (2) that the Sentencing Reform Act, which created the Sentencing Guidelines under which he was sentenced, was enacted in violation of certain provisions of the United States Constitution.

A section 2255 motion may be dismissed without an evidentiary hearing if the "allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because 'they are contradicted by the record, inherently incredible, or conclusions rather than

statements of fact.'" *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (citations omitted). In this instance, I find that Lothrop's allegations are insufficient to justify relief even if accepted as true, and accordingly I recommend that his motion be denied without an evidentiary hearing.

I. Background

Lothrop pleaded guilty on July 6, 1992. Transcript of Proceedings (Docket No. 39) at 3. He stated that he had no disagreement with the Prosecution Version (Docket No. 30), which stated, *inter alia*, that he "knowingly possessed a Hi-Standard .22 Caliber Revolver" and that he had fourteen prior criminal felony convictions. *Id*. at 1-2. At his sentencing hearing, Lothrop was advised of his right to appeal within ten days. Transcript of Proceedings (Docket No. 40) at 13. No appeal was filed.

II. Ineffective Assistance of Counsel

A claim of ineffective assistance of counsel brought in a section 2255 proceeding is governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984):

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, that defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. The *Strickland* test applies to cases that are resolved by guilty plea rather than trial. *Hill*

v. Lockhart, 474 U.S. 52, 58 (1985). To satisfy the "prejudice" requirement in such a context, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id*. at 59. This protestation must be accompanied by a claim of innocence or the articulation of a plausible defense that he could have raised at trial. *United States v. Labonte*, 70 F.3d 1396, 1413 (1st Cir. 1995), *rev'd on other grounds*, 117 S.Ct. 1673 (1997).

Lothrop does not state in his motion or in his reply to the government's response to his motion (Docket No. 47) that he was innocent or that he would not have pleaded guilty but for the alleged errors of his trial counsel.[1] Therefore, he is not entitled to relief on the basis of ineffective assistance of counsel.

The substantive grounds for Lothrop's claim, if the court were to reach them, would also fail to provide him with relief. While failure to file a notice of appeal when a convicted defendant requests it constitutes ineffective assistance of counsel, *Rodriguez v. United States*, 395 U.S. 327, 330 (1969), the statement "I might appeal," Motion at 5, is not a request to file an appeal. Lothrop relies on *United States v. Stearns*, 68 F.3d 328, 330 (9th Cir. 1995), to support his argument that he

[1] Lothrop does state in his reply that his reference to "double occupancy" in his motion means that he and his girlfriend both lived in the apartment where the gun was found and he therefore could not have had constructive possession of it. Reply at 2-3, 5-7. To the extent that this assertion may be construed as a claim of innocence or a plausible defense, even though the requirement that the defendant state that he would not have pleaded guilty has not been met by Lothrop's submissions, this assertion is insufficient as a matter of law. *United States v. Wight*, 968 F.2d 1393, 1398 (1st Cir. 1992) ("[A]s long as a convicted felon knowingly has the power and the intention at a given time of exercising dominion and control over a firearm or over the area in which the weapon is located, directly or through others, he is in possession of the firearm.") Lothrop makes no factual allegations inconsistent with the *Wight* test; if he had made such allegations, they would be inconsistent with his statements to the court at the time of plea and sentencing. Such a departure, unaccompanied by any credible, valid reason justifying the contradiction, is insufficient to overcome the effect of the defendant's original statements. *United States v. Butt*, 731 F.2d 75, 80 (1st Cir. 1984).

need only show that he did not consent to the failure to file a notice of appeal in order to establish a denial of effective assistance of counsel. Lothrop's bare statement is insufficient to establish that he did not consent to the failure to file a notice of appeal. In addition, my research does not reveal any federal circuit court of appeals that has adopted this standard other than the Ninth Circuit. The First Circuit has held that, in the absence of an asserted failure by counsel to comply with a defendant's express request to appeal, a claim of ineffective assistance of counsel based on the failure to appeal must be analyzed under the *Strickland* standard — that is, that the defendant must establish a reasonable probability that a different result would have obtained but for counsel's failure to file an appeal. *United States v. Foster*, 68 F.3d 86, 89 (1st Cir. 1995). As discussed above and below, Lothrop has not established such a probability.

Lothrop's remaining claim is an apparent reference to *United States v. Caron*, 77 F.3d 1 (1st Cir. 1996), in which the First Circuit held for the first time that, for purposes of sentencing under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), convictions after which a defendant's civil rights had been restored could not be counted as prior convictions. *Id*. at 2. Lothrop argues that his counsel provided ineffective assistance because he was unaware of such case law. Obviously, trial counsel in 1992 could not be aware of case law that only came into existence in 1996. In addition, the First Circuit has subsequently held that, where state law imposes restrictions on a felon's right to possess a gun as a result of a previous felony conviction, that conviction does qualify as a predicate offense under the Armed Career Criminal Act. *United States v. Estrella*, 104 F.3d 3, 8 (1st Cir. 1996), *cert. denied*, 117 S.Ct. 2494 (1997). Maine law imposes such restrictions. 15 M.R.S.A. § 393; *United States v. Sullivan*, 98 F.3d 686, 689 (1st Cir. 1996), *cert. denied*, 117 S.Ct. 1344 (1997). Lothrop would not be entitled to relief on this basis in any event.

III. Constitutionality of the Sentencing Reform Act

Lothrop argues that the Sentencing Reform Act, which created the United States Sentencing Commission, the body that created the sentencing guidelines which were applied to him, is unconstitutional. The argument essentially appears to be that the guidelines were enacted into law in violation of the presentment clause of the Constitution. The Supreme Court has upheld the Sentencing Reform Act against a general constitutional challenge. *United States v. Mistretta,* 488 U.S. 361, 412 (1989). The guidelines have been upheld against presentment clause challenges in at least three circuit courts of appeal. *United States v. Zapata-Alvarez*, 911 F.2d 1025, 1027 (5th Cir. 1990); *United States v. Scampini*, 911 F.2d 350, 351-54 (9th Cir. 1990); *United States v. Barnerd,* 887 F.2d 841, 842 (8th Cir. 1989). None of the other constitutional arguments presented by Lothrop provide any basis for departure from the well-reasoned holdings of these courts. I recommend that the court decline his invitation to blaze new, unsupported trails in the field of sentencing, beginning with the necessary outcome of his argument: all sentences imposed upon convictions in all federal courts since the effective date of the sentencing guidelines would be invalid. Lothrop is not entitled to relief on the basis of this argument.

IV. Conclusion

For the foregoing reasons, I recommend that Lothrop's motion to vacate, set aside or correct his sentence be **DENIED** without an evidentiary hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 4th day of September, 1997.

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David M. Cohen
United States Magistrate Judge